RECORD AND BRIEFS

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In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA AND
RANDALL MATHENA, CHIEF WARDEN,
RED ONION STATE PRISON,

Petitioners,

v.

DENNIS LEBLANC,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

REPLY BRIEF IN SUPPORT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF CERTIORARI

INTRODUCTION

It is simply untrue that LeBlanc "is ineligible for any form of parole on his life sentences." Br. in Opp. 3. As the Virginia Supreme Court made clear in *Angel*, juvenile offenders like LeBlanc are eligible for conditional release at age 60 based on "normal parole consideration[s]" under Virginia Code § 53.1-40.01.[1] The parole manual identifies conditional release as a form

[1] *Angel v. Commonwealth*, 704 S.E.2d 386, 402 (Va. 2011).

of parole.[2] And even after the contrary decision below, the Virginia Supreme Court reaffirmed *Angel*, stating that Virginia's geriatric-release system "provides a meaningful opportunity for release that is akin to parole."[3] LeBlanc's insistence that he is ineligible for "any form of parole" is purely semantic. While it is true that Virginia abolished traditional parole for offenses committed after 1994, Pet. 7 n.10, offenders like LeBlanc are eligible for conditional release at age 60 based on the same considerations as in traditional parole. And Virginia's highest court has now twice found that there is no material difference between those two forms of parole with regard to providing a juvenile nonhomicide offender serving a life term with, as *Graham* put it, "some realistic opportunity to obtain release before the end of that term."[4]

Because this case arises on federal habeas, not direct review, the question is not whether *Angel* was correct that Virginia's conditional-release regulations satisfy *Graham*. This Court has twice declined direct review of that question. Pet. 32 & nn.117-18. Rather, the question under AEDPA is whether the Virginia courts were "'objectively unreasonable, not merely wrong; even clear error will not suffice.'"[5] To be objectively unreasonable, the State court's decision must be "'so lacking in justification that there was an error

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[2] App. 161a (II.B.7).

[3] *Johnson v. Commonwealth*, 793 S.E.2d 326, 331 (Va. 2016).

[4] *Graham v. Florida*, 560 U.S. 48, 82 (2010).

[5] *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (per curiam) (quoting *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014)).

well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'"[6]

LeBlanc did not come close to satisfying that "high bar."[7] To conclude otherwise, the Fourth Circuit first had to reject the Virginia Supreme Court's binding interpretation of Virginia's parole regulations, contrary to settled habeas law. It then had to extend *Graham* far beyond its limited holding. Both steps were wrong and plainly violate AEDPA.

ARGUMENT

I. The Fourth Circuit violated AEDPA's deferential-review standard in finding Virginia's system invalid under *Graham*.

A. The Fourth Circuit improperly rejected the Virginia Supreme Court's binding State-law determination that Virginia's conditional-release system applies normal parole considerations.

The Fourth Circuit erred by reading Virginia's parole regulations differently from the Virginia Supreme Court in *Angel*. The regulations state that: "All factors in the parole consideration process . . . shall apply in the determination of Conditional Release."[8] *Angel* expressly rejected a *Graham* challenge because "[t]he

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[6] *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

[7] *Id.*

[8] App. 144a.

regulations for conditional release under this statute provide that if the prisoner meets the qualifications for consideration contained in the statute, the factors used in the normal parole consideration process apply to conditional release decisions under this statute."[9] To be sure, the Fourth Circuit disagreed with that reading of the regulations. Because the sentence on which *Angel* relied occurred in the paragraph under the heading for "Assessment Review," rather than under the heading for "Initial Review," the Fourth Circuit inferred that "the Parole Board may deny a petition for Geriatric Release *for any reason*—without consideration of the 'decision factors'—at the Initial Review stage."[10] But that was merely the Fourth Circuit's inference, not what the regulations actually say. And the court simply failed to credit *Angel*'s contrary reading that drew no distinction between the two stages.

LeBlanc criticizes *Angel* and Virginia for failing "to account" for the difference between the two stages of review, Br. in Opp. 14, but Virginia has steadfastly maintained that *Angel* compels consideration of normal parole factors at *both* stages, including those factors that plainly cover the offender's youth at the time of the offense and his maturity and rehabilitation while incarcerated. Pet. 25. It is LeBlanc and the Fourth Circuit that have failed to account for the Virginia Supreme Court's authoritative interpretation of the Virginia regulations.

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[9] 704 S.E.2d at 402.

[10] App. 24a.

It was reversible error to reject the Virginia Supreme Court's construction. This Court made clear in *Bradshaw* that "a state court's interpretation of state law . . . binds a federal court sitting in habeas corpus."[11] And *Estelle* took pains to "reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."[12] Although Judge Niemeyer pointed out in dissent that Virginia's high court is "the ultimate authority on Virginia law,"[13] the majority did not listen. If the Fourth Circuit had a question about what it called an "unsettled issue of State law," the proper course was to certify it to the Supreme Court of Virginia. Pet. 21-23. Choosing instead to override the State court's contrary holding in *Angel* was a classic violation of *Bradshaw* and *Estelle*, cases that LeBlanc fails to mention.

The Fourth Circuit compounded that mistake by erroneously interpreting the parole regulations to exclude the consideration of an offender's youth at the time of the offense.[14] Judge Niemeyer showed the majority's interpretation to be an incorrect reading of the parole manual, which prescribes factors that obviously cover the offender's youth, as well as his maturity and rehabilitation while incarcerated. Pet. 23-24. LeBlanc effectively concedes that the Fourth

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[11] *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005).

[12] *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

[13] App. 47a.

[14] App. 31a.

Circuit erred on that point by failing to defend it in his opposition.

LeBlanc cannot show that Virginia's conditional-release program violates *Graham* by claiming that its original purpose was "to save the Department of Corrections money" by releasing infirm prisoners, rather than providing release for juvenile offenders who have successfully reformed in prison. Br. in Opp. 10.[15] For one thing, even assuming that was the motivating factor, it dovetails with releasing reformed juvenile offenders when they become eligible. For another, LeBlanc himself introduced into evidence the statement of the Chair of the Virginia Parole Board, who explained that the geriatric-release program was "really focused on people who were going to get very long sentences at a young age *so they would have some opportunity to be released.*"[16] That statement—which LeBlanc now ignores—is fully consistent with using the conditional-release program to comply with *Graham.* And whatever the original motivation, *Angel* clarified

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[15] LeBlanc's authority for ascribing such motive to Virginia does not come from any legislative history, but from a Powerpoint slide presented by the Deputy Director of the Virginia Sentencing Commission at a 2010 conference in Maine. 4th-Cir.-JA 180. The slide stated as "Rationale for Geriatric Release" that "Research shows that, as offenders age, they are less likely to recidivate[.] Some inmates, by virtue of their age and physical condition, are unlikely to pose a threat to public safety[.] Moreover, cost to the Department of Corrections, particularly in medical expenses, is significantly higher for older inmates[.]" 4th-Cir.-JA 193-94.

[16] 4th-Cir.-JA 344 (emphasis added).

that normal parole considerations apply to geriatric-release determinations. LeBlanc cannot discredit that authoritative State-law determination by denigrating the program's origins.

B. LeBlanc wrongly claims that *Graham* already decided this case.

LeBlanc argues that *Graham* effectively decided this case based on two arguments that were not even mentioned in the Fourth Circuit's opinion. Both claims lack merit.

First, LeBlanc argues, Br. in Opp. 1, 4, 9, that this Court already branded Virginia as a life-without-parole jurisdiction when *Graham* said that "[o]ur research shows" that Virginia had incarcerated eight "juvenile nonhomicide offenders serving life without parole sentences," and when *Graham* included Virginia in an appendix listing jurisdictions that permitted life without parole for such offenders.[17] But this Court has repeatedly "explained that '"clearly established Federal law" for purposes of § 2254(d)(1) includes *only the holdings, as opposed to the dicta*, of this Court's decisions.'"[18]

Because Virginia's juvenile sentencing system was not at issue in *Graham* nor part of the Court's holding,

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[17] 560 U.S. at 63, 84.

[18] *Woods*, 135 S. Ct. at 1376 (quoting *White*, 134 S. Ct. at 1702) (emphasis added).

the references to Virginia were plainly dicta that cannot support a finding that Virginia's courts unreasonably applied *Graham*'s holding. In any case, when the opinion in *Graham* cited Virginia's system, it overlooked Virginia's conditional-release statute.[19] And *Angel* determined post-*Graham* that juvenile nonhomicide offenders *are* eligible for release based on normal parole considerations when they turn 60. Accordingly, *Graham*'s comments about Virginia are not controlling and did not prevent the Virginia Supreme Court from reaching a different conclusion.

Second, LeBlanc claims that Virginia's conditional-release statute is similar to Florida's medical-release statute, Fla. Stat. § 947.149, and that because this Court found that Florida had imposed a life-without-parole sentence on Graham, Virginia's statute must also be deemed noncompliant. Br. in Opp. 11-12. But *Graham* did not even mention Florida's medical-release statute. So there is not even dictum in *Graham* on which to hang LeBlanc's argument. And unlike Virginia—which has consistently maintained that juvenile offenders like LeBlanc are eligible for release based on normal parole considerations at age 60—Florida *defended* the life-without-parole sentence it imposed in *Graham*.[20] LeBlanc also neglects to mention

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[19] 560 U.S. at 84 (omitting Va. Code Ann. § 53.1-40.01).

[20] Br. of Resp't at 58 n.38, *Graham v. Florida*, 560 U.S. 48 (2010) (No. 08-7412). *Cf. Miller v. Alabama*, 132 S. Ct. 2455, 2462 n.2 (2012) (noting that Arkansas claimed for the first time on appeal that its system did not impose a mandatory life-without-parole sentence, "[b]ut Arkansas never raised that objection in the

that Florida's medical-release statute applies only to a "[p]ermanently incapacitated inmate" or a "[t]erminally ill inmate."[21] The Florida statute therefore is not comparable to Virginia's conditional-release program, which has no such limitations.

This Court has emphasized that in applying AEDPA, "if the circumstances of a case are only 'similar to' our precedents, then the state court's decision is not 'contrary to' the holdings in those cases."[22] *Graham* did not address what type of parole would provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[23] To the contrary, the Court said "[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance."[24] And the deference afforded State courts under AEDPA is even broader when, as here, "the 'precise contours' of [a] right remain 'unclear.' "[25] Indeed, as the Ninth Circuit noted in *Demirdjian*, this Court's 2003 decision in *Lockyer v. Andrade* already demonstrated that a life-without-parole sentence is "materially distinguishable" for AEDPA purposes from the

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state courts, and they treated Jackson's sentence as mandatory. We abide by that interpretation of state law.").

[21] Fla. Stat. § 947.149(1).

[22] *Woods*, 135 S. Ct. at 1377.

[23] 560 U.S. at 75.

[24] *Id.*

[25] *Woods*, 135 S. Ct. at 1377 (quoting *White*, 134 S. Ct. at 1705).

50-year aggregate sentence—with parole eligibility at age 87—at issue in *Lockyer*.[26]

Providing eligibility for conditional-release at age 60 based on normal parole considerations is likewise "materially distinguishable" under AEDPA from a system that imposes life without parole. Because *Graham* did not "confront 'the specific question presented by this case,' the state court's decision could not be 'contrary to' any holding from this Court."[27]

C. The Fourth Circuit wrongly interpreted *Graham* to require a probability of release and to reject an age-60 threshold.

The Fourth Circuit doubled down on its *Estelle-Bradshaw* error when the court based its decision on two novel interpretations of *Graham* that plainly extended *Graham*'s holding, also in violation of AEDPA.

First, contrary to LeBlanc's characterization, Br. in Opp. 19, the Fourth Circuit interpreted *Graham* to require that a State parole system ensure early release in the "vast majority of cases," and the court then found Virginia's system wanting for not meeting that expectation. The Fourth Circuit clearly stated:

> But under clearly established Supreme Court precedent—precedent repeatedly relied on by

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[26] *Demirdjian v. Gipson*, 832 F.3d 1060, 1077 (9th Cir. 2016) (discussing *Lockyer v. Andrade*, 538 U.S. 63, 73-74, 79 (2003)).

[27] *Woods*, 135 S. Ct. at 1377 (quoting *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) (per curiam)).

> *Graham*, *id.* at 70—"parole" should be the "normal expectation in the vast majority of cases," *Solem [v. Helm]*, 463 U.S. [277], 300-03 [(1983)]. It was objectively unreasonable, therefore, for the Supreme Court of Virginia to take the position that a penal regime under which it concedes early release is the exception, rather than the expectation, complies with *Graham*'s meaningfulness requirement.[28]

We accurately characterized that gloss on *Graham* as requiring that a parole system ensure a *probability* of release. For the Fourth Circuit just said in that block quote that a parole system violates *Graham* if "early release is the exception, rather than the expectation."

That is a breathtaking expansion of *Graham* that finds no support in its dicta, let alone its holding. A probability-of-release requirement is in tension with *Graham*'s assurance that "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime."[29] And it contradicts the representation of Graham's counsel to Chief Justice Roberts that a parole system resulting in 1 in 20 juvenile offenders obtaining release would be constitutionally sufficient. Pet. 27. Indeed, LeBlanc implicitly recognizes that a probability-of-release requirement is not supported by *Graham* because he insists that the Fourth Circuit did not say what it plainly said.

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[28] App. 29a.

[29] 560 U.S. at 75.

Notably, LeBlanc does not dispute the magistrate judge's conclusion that the geriatric-release statistics likely *understate* the true chances of release for juvenile offenders in LeBlanc's situation. But even taking those statistics at face value, they showed that 5.8% of the offenders who applied for geriatric release received it, more than the 1 in 20 that Graham's counsel conceded would pass constitutional muster. *See* Pet. 12, 27.

Second, LeBlanc tries to recast the Fourth Circuit's rejection of the age-60 threshold for conditional release. It is not so much a rejection of age 60, he suggests, but that juvenile offenders must serve longer to reach that age than adult offenders, something he claims violates *Graham*'s premise that juveniles must be treated differently. Br. in Opp. 16-17.

But *Graham* provides no support for rejecting a State-parole system on the ground that a juvenile offender might serve a longer sentence in a particular case than a person who committed the same crime as an adult. Pet. 29-30. Judge Niemeyer correctly observed in dissent that that rationale would vitiate any term-of-years sentence imposed on a juvenile because "a young person's chances of serving a full sentence are inherently higher than an older person's."[30] As this Court said in *White*, "[s]ection 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* this Court's precedent; it does not require

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[30] App. 58a.

state courts to *extend* that precedent or license federal courts to treat the failure to do so as error."[31]

II. The Fourth Circuit has created a split over whether parole eligibility at age 60 negates a life-without-parole sentence.

Graham's prohibition of life-without-parole sentences for juvenile nonhomicide offenders cannot apply if parole eligibility at age 60 converts it into a life-*with*-parole sentence. LeBlanc does not dispute that federal and State courts have consistently held that the opportunity for parole at age 60 (or even later) means that it is *not* a life-without-parole sentence. Pet. 34-36 (collecting cases). The South Dakota Supreme Court recently joined that long list, holding that a 92-year sentence with parole eligibility at age 60 was not life without parole.[32]

Certiorari is warranted because the Fourth Circuit departed from that rule. It now stands alone in concluding that parole eligibility for juvenile nonhomicide offenders at age 60 nonetheless violates the Eighth Amendment. Extending *Graham* that far in a case governed by AEDPA was plain error.

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[31] *White*, 134 S. Ct. at 1706.

[32] *State v. Charles*, No. 27691, 2017 WL 1199763, at ¶ 10, 2017 S.D. LEXIS 32, at *7-8 (¶ 10) (S.D. Mar. 29, 2017).

III. The split creates intractable problems for Virginia's criminal-justice system and warrants summary reversal.

LeBlanc is wrong to minimize the disruption to Virginia by saying that the ruling below affects only 21 juvenile offenders serving life sentences. Another 75 offenders serving aggregate sentences of 40 years or longer can also invoke *LeBlanc*, even though this Court has not yet decided if *Graham* applies to aggregate-sentence cases. Pet. 32-33. Indeed, one federal habeas judge recently ordered resentencing of a juvenile offender serving an aggregate 77-year sentence; the judge found conditional release at age 60 inadequate because, "as noted by the Fourth Circuit in *LeBlanc*, there is *no guarantee* that [the juvenile's] petition for early release will ever be granted."[33] That judge's understanding that *LeBlanc* now requires a "guarantee" of early release shows the serious mischief that the decision will continue to spawn unless corrected.

What is more, LeBlanc ignores that in new cases involving Virginia's most serious juvenile offenders, State judges will confront the dilemma that a lengthy sentence that is valid under *Angel*, with parole eligibility at age 60, may well be deemed invalid under *LeBlanc*. The only way to steer clear of *LeBlanc* would be to impose a sentence shorter than "life without parole."

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[33] *Contreras v. Commonwealth*, No. 1:13cv772, 2017 WL 372330, at *5 (E.D. Va. Jan. 26, 2017) (emphasis added), *appeal docketed*, No. 17-6307 (4th Cir. Mar. 9, 2017).

But how long is that? This Court has provided no guidance to determine when a lengthy term-of-years sentence amounts to a life sentence.

Thus, the decision below not only splits with authorities nationwide, but it seriously disrupts Virginia's criminal-justice system. Summary reversal is warranted before the errors planted in *LeBlanc* spread their invasive roots any further.

CONCLUSION

This Court should grant the petition for writ of certiorari and then summarily reverse the judgment of the Fourth Circuit.

Respectfully submitted,

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